
GLOBALIZATION AND WATER RESOURCES MANAGEMENT: THE CHANGING VALUE OF WATER

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THE ROLE OF INTERNATIONAL LAW IN RESOLVING PALESTINIAN/ISRAELI WATER CONFLICT

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ABSTRACT: Palestinian/Israeli Water conflict is a major threat to sound and sustainable peace in the Middle East. This paper addresses the question of how the international law could be employed to achieve an integrative arrangement of mutual benefit to the parties in conflict, despite the fact that the conflict situation involves fixed resources for which both sides are competing. A quick assessment of strengths and weaknesses of the current declarations and agreements was made investigating their potential as a point of departure for future permanent agreements. The challenging issue here is how the parties could negotiate the agreement irrespective of their power relations with the notion that there can be role for international law principles to be applied within this context. The paper starts by describing the current utilization of the international watercourses and follows on by an analysis to the existing declarations and agreements and their reference to international law and finally assesses the role of International Law in solving the conflict. As a precondition, the parties should agree on common objective criteria in their efforts to conclude a water treaty. It is recommended that a more in-depth revision of the style of negotiations is undertaken in an attempt to give momentum for the currently quasi-frozen negotiation process. Furthermore, there is a need for mutual conscious to the need for appropriate co-operation on the utilisation of the shared resources in an optimal manner for the present as well as for future generations. The future water agreement may well go beyond the borders of reallocating water between the legitimate Watercourse States by setting forth the bases for continued co-operation to develop and implement common projects and plans.

KEY TERMS: International watercourses, equitable and reasonable utilisation, regional cooperation

INTRODUCTION

The violation of the rights of people to equitable and fair utilization of the shared water resources is contrary to the spirit and principles of the customary international law and has for long time been one of the major obstacles for cooperation and the achievement of peace between the Palestinians and Israelis. The Water Resources under question are the international groundwater resources shared between Israel and the West Bank (WB) and Gaza Strip (GS), and the Jordan River basin that is shared between Israel, Lebanon, Syria Jordan and the Palestinian Authority.

After many years of struggle, the Israelis and Palestinians are at the table of negotiations. The negotiations in question are characterized by the inequality in powers among the disputants. Analysis of the style of negotiation reveal that the bottleneck is that one party does not recognize the other party's right to existence nor does it acknowledge other parties' national aspirations. Minimum progress has been made during the last seven years of negotiations. No common agreement on the overarching principles for the future utilization of the international watercourse has been yet achieved.

A crucial task, along with solving problem, is to induce, persuade, or pressurize mutual acceptance not only of legitimacy but also of the desire to negotiate. The challenge is viewed here is how the parties could negotiate the agreement irrespective of their power relations and the notion that there can be a role for ethical considerations and good intentions.

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This paper starts by describing the current utilization of the international watercourses and follows on by a quick analysis to the existing declarations and agreements and their reference to international law and finally assesses the role of international law in solving the conflict and the legal instruments it offers for regulating the non-navigational uses of these resources.

As a precondition the parties should agree on common objective criteria in their efforts to conclude a water treaty. A more in-depth revision of the style of negotiations has to be undertaken in an attempt to give momentum for the currently quasi-frozen negotiation process. The future water agreement should go beyond the borders of reallocating water between the legitimate watercourse states; it should however set the bases for continued cooperation to develop and implement common projects and plans.

Background & Historical Overview

Extensive literature exists on the historical evolution of the water problem dating back to some one century. Authors and researchers agree that water has always been considered an important strategic element in the Israeli development plans for regional development. It has also been always a source of economic and political stress. Israel has been tapping into the Yarkon-Taninim, or Western Mountain, aquifer since 1955. It also relies on two other aquifers that recharge on the WB - the Northeastern and the Eastern mountain aquifers; the former discharges into the Jezreel Valley and the latter into the Jordan Valley. The three aquifers combine to provide about 30 per cent of Israel's water supply.

One of the major outcomes of the 1967 occupation was the annexation of much of the headwaters of the Jordan River by Israel, and the loss of Jordan of a significant amount of its available water supply. Since 1967, the key problem relating to international watercourses in the region involves the strict Israeli policy in relation to water allocations in the WB and GS, which deprived the Palestinian people of their basic human rights for adequate water quality and quantity.

Currently the Israelis are dependent on the subterranean water supply of the WB. Approximately 40% of the groundwater upon which the state of Israel is dependent and more than one-quarter of its sustainable annual water yield originate in the WB.

Political Context

After long years of struggle, the Palestinians and Israelis started their negotiations in 1992. The aim of the Israeli-Palestinian negotiations within the current Middle East peace process was, among other things, to establish a Palestinian Interim Self-Government Authority for the Palestinian people in the WB and the GS, for a transitional period not exceeding five years, leading to a permanent settlement based on Security Council Resolutions 242 and 338.

Within the framework of the Middle East Peace Process, the Declaration of Principles (DOP) was signed between the Government of the State of Israel and the Palestinian Liberation Organisation (PLO). The DOP was the first initiative showing the willingness of both parties to put an end to the decades of confrontation and to live in peaceful coexistence. The "Gaza-Jericho First" Agreement was signed between the PLO and the State of Israel regarding the autonomous rule of the Palestinian Authority PA, in Jericho and the Gaza Strip on May 4, 1994. In 1995, the Government of the State of Israel and the PLO, entered into an interim agreement on the West Bank and the Gaza Strip. Both Parties showed desire for putting into effect the DOP. They also reaffirmed their recognition of mutual legitimate and political rights.

The successive Israeli governments after the murder of Yizhaq Rabin the former prime Minister of Israel, did not fully accept the Peace Agreements that were signed with the PLO. Delay and slow progress has characterized the implementation of the existing treaties. Currently the negotiations are semi-frozen due to the high political tensions among the Palestinians and Israelis.

WATER SITUATION

Availability

The large variations in rainfall and limited surface resources in the region have led to widespread scarcity of the fresh water resources in the region. Great reliance is put on the groundwater resources as the major resource for the various uses. The overall contribution of surface water to the overall water balance is limited and marginal.

The sources of water in the WB are those renewable waters of the Mountain aquifer that rises and outcrops in the WB but extend across and below the territories of Israel. The main recharge acceptance area is the core of the WB with altitudes higher than 400 meters feeding the major aquifers in the area. The Gaza aquifer, which is a classical coastal aquifer, represents the sole water source of the GS covering an area of 360 (km²). The groundwater recharge in the WB is the direct infiltration of rainwater through fractured, karstic rocks and porous soils. The overall balance in the West Bank is estimated to be 679 MCM/yr, while in Gaza it is estimated at 45 MCM/yr. The Gaza aquifer, which is part of the coastal aquifer, has a total recharge of approximately 60 mcm/yr. The water quality is the main issue in Gaza. The Gaza aquifer is threatened from two sides, by sea water and salt ground water intrusion due to over pumping, and by pollution, especially nitrate, from above, due to overuse of fertilizers and infiltration of sewage.

The Jordan River has an average annual flow of 1300 mcm. The main rivers in Jordan are the Jordan, the Yarmouk, and the Zarqa. While the water quality of the Jordan and the Yarmouk Rivers considered to be good, the Zarqa River, flowing entirely within Jordan's borders, faces a pollution crisis that prohibit both access and the use of its water.

Utilization

Currently the Israelis are dependent on the subterranean water supply of the WB. Approximately 40% of the groundwater upon which the state of Israel is dependent and more than one-quarter of its sustainable annual water yield originate in the WB. The size of the problem for Palestinians may be best illustrated by noting that the total available groundwater in Israel and the Palestinian Territory is 1,209 million cubic meters (mcm)/year out of which 1,046 mcm/year is currently being used by Israelis, while the Palestinians are permitted to use only 259 mcm /year of this resource.

The imbalance of current rights over water use translates into an imbalance in water consumption. The Palestinian domestic per capita consumption of 35-80l/day is far below the WHO standards, which assign a minimum of 100 l/day. On the other end the Israeli per capita consumption exceeds 300 l/day. Israel also uses about 800 mcm/yr of the total quantities of the Jordan River water, which implies that Israel's water either comes from rivers that originates outside the border, or from disputed lands.

The Israeli legal experts normally rely on the following factors for supporting their claims to water rights in the region. First the Precedence of "Prior Use" or "Historical Rights" in the water resources in the region. This principle has always taken precedence over the equitable utilization principle. Second, since all existing uses are non-negotiable the Israeli side persistently mentions the availability of alternatives of comparable value like resorting to options such as desalination, wastewater reuse and import of water from neighbouring countries.

WATER NEGOTIATIONS AND POTENTIAL PROBLEMS TO DATE

The Declaration of Principles DOP

Annex III of the DOP establishes an Israeli-Palestinian continuing Committee for Economic Cooperation, focusing on many areas among which water was an important one. Cooperation in the field of water includes a "Water Development Program" prepared by experts from both sides, which will also specify the mode of cooperation in the management of water resources in the WB and GS, and will include proposals for studies and plans on water rights of each party, as well as on the equitable utilization of joint water resources for implementation in and beyond the interim period. Annex III also calls for the preparation of proposals, studies and plans on water rights for each party as well as on the equitable utilization of joint water resources for the implementation in and beyond the interim period.

According to the DOP, the two sides will cooperate in the context of the multilateral peace efforts in promoting a development program for the region, including the WB and the GS. The Economic development program for the WB and GS includes among other things the development of water infrastructure. As for the regional program the it involves the development of a joint Israeli-Palestinian-Jordanian Plan for coordinated exploitation of the Dead Sea area, the Mediterranean Sea (Gaza), Dead Sea Canal, Regional Desalination and other water development projects.

The significance of the DOP lies in its reference to the necessity of cooperation and coordination pertaining to water issues within and beyond the interim period. It was considered the benchmark for future negotiations. Theoretically, the institutional mechanism that was proposed within the DOP opens ways and allows for dialog between the two parties on the crucial matters and decisions pertaining to water. The DOP is the only official document whereby both parties agreed to undertake studies and prepare proposals on the "equitable utilization" of joint resources for the implementation in and beyond the Interim Agreement.

Gaza Jericho First Agreement

This Agreement dealt with the water issue in the context of environmental protection and prevention of environmental risks, hazards and nuisances, The Agreement allowed for new wells to be drilled on conditions that they cause no harm for the Israeli current utilization. The Agreement applies only to the water and wastewater resources and systems in the GS and Jericho Area. Its clearly confirming the need for Israel and the Palestinians to adopt, apply and ensure compliance with internationally recognized standards concerning acceptable levels of land air water and sea pollution, and acceptable levels of treatment and disposal of solid and liquid wastes. The two parties agreed to a subcommittee to deal with all issues of mutual interest including the exchange of all data relevant to the management and operation of the water resources and systems and mutual prevention of harm to water resources. The Agreement is viewed to focus on the “no harm principle” and the continuation of their current water entitlement more than any other substantive or procedural rules. The institutional mechanism established is through an Environmental Expert Committee or coordination of environment issues, to be convened when the need arises.

The Interim Agreement on the WB and GS

Within the Interim Agreement both parties recognised the need to protect the environment and utilise the natural resources on a sustainable basis. The sphere of cooperation includes among other things the sewage solid waste and water. Both parties agreed to strive to utilise the natural resources, pursuant to their own environmental and developmental policies, in a manner, which shall prevent damage to the environment, and shall take necessary measures to ensure that activities in their respective areas do not cause damage to the environment of the other side. The Agreement explicitly states that Israel recognises the Palestinian water rights, which will be negotiated in the permanent status negotiations. The nature of these rights was not identified nor the overarching principles governing the rights and obligations of both parties were set.

Appendix I of Annex III Article 40 of the Interim Agreement deals with water allocations to fulfil the immediate needs of the Palestinians and gives no due consideration to the principle of equitable and reasonable utilization. Under the same article the two parties agreed to establish a permanent Joint Water Committee JWC for the Interim period. The main aim of the JWC is to undertake the implementation of Article 40. It was further agreed that decisions of the JWC should be reached by consensus, including the agenda, the procedures and other matters.

Potential Problems

To date the water conflict has been dealt with in isolation from the principles of the International law. The existing inequitable utilization of the international watercourses has been considered as *de facto* and the “no harm principle” seems to be the overarching principle at least from an Israeli perspective. The principle of equitable and reasonable utilization is not a cornerstone in any of the signed agreements specifically the interim agreement. These agreements do not have the obligation on Basin States to consider the permanent unity of a drainage basin and to treat the basin as an integrated whole that should be equitably and reasonably utilized by Watercourse States. Issues of mutuality and the necessity to cooperate are also very importance concepts which were neglected in the current treaties. Cooperation in the context of signed treaties and declarations was emphasized to ensure that *status quo* of current utilizations is maintained.

Only additional amounts to serve the urgent water needs were allocated for the Palestinians in Article 40; these will be developed from the Eastern Aquifer Basin and any other agreed sources as the Article indicates. This section though emphasizing that Israel recognizes the Palestinian water rights in the WB but no definitions were given to these rights. Furthermore, the overarching principles governing the rights and obligations of both parties were not set. The negotiations of these rights were postponed for the permanent status agreement.

On the other hand, comparing what has been agreed upon with what is actually achieved is a strong indication for the complexity of the situation and the inequality in the power structures that has always favoured the Israelis. Decision-making within the JWC was unilateral, always dependent on the consequence of the proposed Palestinian projects on the *status quo* of the Israeli current utilization. The “No Harm Principle” was the dominant factor in the Israeli evaluation and rejection of the Palestinian projects and plans. In the past six years the Palestinians developed only 13 mcm out of 80 mcm (Minutes of Meetings of the JWC between 1996-2000). The repeated Israeli claim that these projects will cause harm to current Israeli utilization was a major obstacle for the successful implementation of the agreement.

POTENTIAL ROLE OF INTERNATIONAL LAW IN CONFLICT RESOLUTION

Equitable and Reasonable Utilization and the “No Significant Harm”

Future negotiations and agreement between the Palestinians and Israelis may very well benefit from the 1997 Convention (the Convention) offers concerning “reasonable utilization of international watercourses. The principles of “equitable utilization” and “no harm” are valid but more difficult to monitor and achieve. For negotiations to be fruitful Palestinians and Israelis should formulate their new water treaty within the framework of the 37 articles constituting the 1997 UN Convention.

The principle of equitable and reasonable utilization is set forth in Article 5 of the 1997 United Nations Convention on the Law of Non-Navigational Uses of International Watercourses. This principle was identified as the governing rule by the International Court of Justice in its 1997 decision in the Gabcikovo-Nagymaros case involving Hungary and Slovakia. The Court explicitly referred to the “basic right” of Hungary to an equitable and reasonable sharing of the resources of the international watercourse. On the other hand Article 7 convention sets forth the obligation on Watercourse States not to cause significant harm to other Watercourse States. Where significant harm is caused the Watercourse State causing this harm must take all-appropriate measures to eliminate and mitigate such harm and where appropriate discuss the question of compensation.

Extensive discussions within the ILC took place during the readings of the convention pertaining to which of the two principles has the legal precedence? In other words how to best achieve balance between “equitable and reasonable utilization” and “no significant harm” principles. How would an upstream state like Israel - in the case of the Jordan River, judge that their use of the international course is reasonable, equitable and at the same time not causing harm to the Palestinians who live downstream? The Convention has dealt extensively with this matter where, in summary, a balance between the two principles has to be maintained.

Qualifying the “harm” by being “significant” indicates the importance aimed not to hamper the utilization of international watercourse. Watercourse states may utilize an international watercourse in an equitable and reasonable manner, but still have the obligation not to cause significant harm. To fulfil their obligations in the regard Watercourse States have to ensure an exchange of data and information regarding the use and status of the watercourse that will enable all affected Watercourse States to agree a balance between the two principles.

Proposed Approach

Accept common criteria and principles

Both parties should agree on the main principles of International law regarding Watercourse States’ rights; recognizing that each of the nations on an international watercourse has a right to a portion of the water. A first step to estimate how much water is demanded by both parties to ensure enough water to meet the domestic needs as well as the needs of all their economic development. A new assessment of all joint groundwater resources becomes therefore a necessity. An “Expert Facts Finding Mission” EFFM, with the aim to investigate reliability of data pertinent to the availability and utilization of these resources could be established. A third party that is accepted by both sides might establish the EFFM.

The source of data for the EFFM will be the hydrogeological investigations done by the Israelis and the Palestinians in the WB and GS. The EFFM membership should be based on purely professional basis and might include Palestinian, Israeli as well as international experts. The two parties shall exert their best efforts to agree on the EFFM conclusions or at least develop a common position in that regard. The recommendations of the EFFM shall form the basis for further discussions on the procedure for implementing the equitable and reasonable utilization.

Identify what is equitable, what is reasonable

Article 5 of the Convention contains an important aid to interpretation in deciding what constitutes “equitable and reasonable” use. It describes the main factor, although the list is not exhaustive, which is only natural in view of the framework character of the convention. Specific criteria based on the elements of Article 5 of the Convention and other accepted factors for division of water should be commonly developed. This would require accurate and reliable information and data to be shared by the parties. International Legal Experts Committee ILEC to be involved in assigning weights to the factors relevant to equitable and reasonable mentioned in Article 6 of the UN

Convention and in consultation with the EFFM. These weights have to be determined by its importance in comparison with that of other relevant factors. In determining what is equitable and reasonable use, all relevant factors are to be considered together and a conclusion reached on the basis of the whole.

Develop future cooperation

A mechanism for cooperation between the two parties may be achieved based on international law and on the assumption that "good intentions" will govern the relationship between both parties. In principle, if both parties agree to apply the principle of equitable and reasonable utilization based on the above implementation procedures a water treaty between both parties could be formulated on equal footing.

The principle of "equitable utilization" is a basic foundation for such a treaty. A mechanism of joint cooperation would have to be established within the agreement to ensure exchange of complete data and information on agricultural, industrial and domestic water use.

A new treaty concerning the Jordan River System will be easier to achieve and monitor than in the case of the West Bank groundwater resources. A treaty concerning the latter could, however, also benefit from other existing international water treaties regarding the uses of international surface watercourses.

The new treaty should, therefore must ensure each party's obligations towards cooperation and adequate coordination. Resolving conflict over water rights will require a major effort of "political willingness" to accept changes in the *status quo*.

It is believed that based on the available existing resources and the projected needs for development there will always be a regional shortage. It is therefore beneficial for both to commonly plan for the valuable regional water resources to ensure their sustainable development. They could also cooperate in the areas of developing non-conventional water resources; i.e. desalinated water.

Since there is no obligation in the general international law to settle dispute, this issue will rest on the consent of the parties. A mechanism for future dispute settlement shall be part of the common criteria adopted by the parties.

FINDINGS AND RECOMMENDATIONS

Existing peace agreements between Israel and the PLO on the WB and GS do not go beyond some temporary solutions for emerging crises nor do they create a sustainable and permanent solution. These Agreements were concluded in an unjust and inequitable manner basically a situation where the weak has to face the strong. The existing Agreements are merely temporary solution for solving the immediate needs of the Palestinians, in addition to being a mechanism that coordinates water-related activities within the two areas of Jurisdiction for the transitional five years of the interim period, which has expired in Sep. 1998.

It will require real prodigious efforts from the Palestinian negotiators and the international mediators to engage the Israelis in negotiations over water within the above-proposed approach to resume the final status negotiations. The findings of the paper emphasize that Israel has continuously practiced a unilateral control over *all* water resources in the WB and GS not fulfilling its obligations as a belligerent occupier under the international law. Furthermore, the current utilizations of the international watercourses does not by any means comply with the main principles of the international law specifically the principle of equitable and reasonable utilization. The continuation of the *status quo* is a clear persistent violation to the principles of the international law.

This paper strongly recommends that the Palestinians and the Israelis abide by the principles of the International Law. The UN Convention serves as a guideline for future agreement. This framework is widely believed to ensure the utilization, development, conservation, management and protection of the international watercourse and the promotion of the optimal and sustainable utilization for the present and future generations. The final agreement on water should include solutions and mechanism for cooperation on the various international issues. It is envisaged that neither party will afford bearing further consequences of the continuation of the water conflict as being a major threat to peace.

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